

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2009

STATE OF TENNESSEE v. GLYN DALE

Appeal from the Criminal Court for Knox County

No. 83055

**James B. Scott, Special Judge at Trial and Sentencing
Bobby R. McGee, Judge at Motion for New Trial Hearing**

No. E2008-01139-CCA-R3-CD - Filed March 31, 2010

The Defendant, Glyn Dale, was convicted by a Knox County Criminal Court jury of two counts of child rape, a Class A felony. Following a sentencing hearing, the trial court sentenced the Defendant to twenty years for each count, to be served concurrently. In this appeal as of right, the Defendant argues that: (1) the trial court erred in allowing the jury to consider testimony regarding a diary that no longer existed at the time of trial and in denying his motion for a mistrial after the jury heard such testimony; (2) the trial court erred in allowing two witnesses to testify regarding the victim's prior consistent statements; (3) the evidence was insufficient to support his conviction; (4) the trial court erred in failing to include a lesser included offense in the jury charge; (5) the trial court erred in sentencing the Defendant. Following our review, we affirm the judgments of conviction in this case. However, because the Defendant was sentenced without a proper execution of a written waiver of his ex post facto protections, we remand the case for a new sentencing hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are
Affirmed in Part and Reversed in Part; Case Remanded.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and CAMILLE R. MCMULLEN, J., joined.

Mark E. Stephens, District Public Defender; and Julie Auer and Robert C. Edwards, Assistant Public Defenders, attorneys for appellant, Glyn Dale.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Steve Sword, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

At trial, the victim, E.C.,¹ testified that she was twelve years old when she was raped by the Defendant at her aunt's house. E.C. stated that she would occasionally stay with her aunt, Michele Brown, during the weekend. The Defendant also spent significant time at Ms. Michele Brown's house because he and Ms. Michele Brown have three children together. The Defendant frequently spent the night when E.C. and her brother were visiting.

E.C. testified that she stayed at Ms. Michele Brown's house for a weekend in June 2004, and on that weekend, E.C. was watching a movie in the living room on the couch² after everyone went to sleep. E.C. was partially awake when the Defendant "came in there and got on top of [her] and took his clothes off" and said, "'don't tell nobody and don't yell.'" The Defendant then removed E.C.'s clothes and vaginally penetrated her with his penis. The rape lasted approximately two to three minutes before the Defendant left. The next morning, E.C. used the bathroom and noticed blood coming from her vagina. E.C. stated that the rape "hurt" and that she cried herself to sleep that night.

E.C. then testified that the Defendant raped her again before her thirteenth birthday in July 2004. This time, E.C. was asleep at Ms. Michele Brown's house on a different couch in the living room when she woke up and the Defendant "was on top of [her]" and said, "'[d]on't scream and don't yell.'" The Defendant got off her after two or three minutes. E.C. stated that this rape also "hurt" but that she did not see any blood after this rape.

According to April Penson, E.C.'s mother, E.C.'s behavior changed after the rapes, and she became "hard to deal with." Before the rapes, she was "a good little girl" who was "to herself, kind of quiet . . . but overall she's a good, happy child." After the rapes, in the Fall of 2004, E.C. was "just kind of mad . . . [and] short with people." Ms. Penson repeatedly asked E.C. if "anybody bothered her or touched her," but she "couldn't get anything out of her" until she visited E.C.'s school and spoke with the principal, David Dowling.

¹It is the policy of this court to refer to victims of sexual offenses by their initials.

²There was some conflicting testimony regarding the sleeping arrangements. E.C. testified that she slept on the couch in the living room, while Ms. Michele Brown testified that E.C. slept in her daughter's room. However, Ms. Michele Brown admitted that she went to bed before everyone else in the house.

Mr. Dowling testified that E.C. was a quiet girl who was “struggling with work habits, wanting to do well, trying to get her education going in the right direction.” However, in the Fall of 2004, E.C. was “[s]hort-tempered [and] withdrawn.” He attempted to talk to her on several occasions, and he called her into his office on several occasions. On one such occasion, in September 2004, E.C. told him that she was raped by a family member’s boyfriend. Mr. Dowling then called Ms. Penson, who came to the office and talked with E.C. about the rapes.

E.C. was eventually taken to the ChildHelp Children’s Center of East Tennessee (ChildHelp) on Kingston Pike in Knoxville, Tennessee. At ChildHelp, Dr. Charles William Machen performed a “full-systems physical examination” on E.C. Among other areas, he examined her external genitalia, the vulval vestibule, and the hymen. Dr. Machen stated that E.C. had “two notches in her hymen.” One notch was very shallow and the other “was a deeper notch that extended to at least 50 [percent] of the width of the hymen.” According to Dr. Machen, the second notch was significant because “when you see a notch that extends to at least 50 [percent] of the width of the hymen or greater, that notch is concerning for trauma, blunt or penetrating trauma, to the hymen.” He stated that because E.C. had a “fully pubertal hymen,” her hymen was “thicker and more elastic;” therefore, if a doctor had applied sutures at the time of the trauma, her hymen may have healed. However, because her hymen was not repaired, “the edges of [the] tear beg[a]n to smooth out,” and the notches formed. He stated that these notches were consistent with some form of penetration.

Sometime after E.C. told Ms. Penson and Mr. Dowling about the rapes, the Defendant called Ms. Michele Brown’s mother, Addie Brown. He spoke with Ms. A. Brown and her son, Mr. Glen William Butts, III, about the rapes. Ms. A. Brown lived next door to Ms. Michele Brown with her son, Mr. Butts. Mr. Butts and Ms. A. Brown both testified at trial regarding their conversation with the Defendant. Although the Defendant had a speech impediment and tended to slur his words, Mr. Butts and Ms. A. Brown contended that they understood the Defendant and knew what he was saying.

Ms. A. Brown stated that she had known the Defendant for approximately fifteen years because he lived with her daughter in the house next to her house. She knew “something about [E.C.] having sex with somebody,” but she never noticed anything between E.C. and the Defendant. However, she did “recall [the Defendant] calling [E.C.] to the [Defendant’s] bedroom a couple of times.” Ms. A. Brown first heard about the rapes when the Defendant called her house and said that “he was the one that we were looking for that had sex with [E.C.]” According to Ms. A. Brown, the Defendant sounded “arrogant.” He stated that he was “interrupted the first time” he had sex with E.C. When she asked him, “how many times did this go on,” the Defendant answered, “Oh, two times.” He said that he had sex with her “right before her 13th birthday.” When Ms. A. Brown told the

Defendant that “he was going to jail,” he responded by saying, “that’s what [my] daddy told [me].”

Mr. Butts stated that he had known the Defendant for approximately ten years and that he worked with the Defendant at the Tennessee Valley Authority in Kingston, Tennessee. He first heard about the rapes when the Defendant called his house. When Mr. Butts heard Ms. A. Brown on the phone, he grabbed the phone from her to speak with the Defendant. According to Mr. Butts, the Defendant said, “I f----d up, I f----d up.” Later the Defendant said, “I had sex with [E.C.]”

After a Tennessee Rules of Evidence 412 hearing, Ms. Michele Brown testified as a defense witness at trial. She stated that sometime before E.C. accused the Defendant of raping her, E.C. called her house hoping to speak with her daughter. Ms. Michele Brown spoke with E.C. for a few moments before telling her that it was too late to speak with her daughter, who was approximately seven years old at the time. In their conversation, Ms. Michele Brown asked E.C. if she was having sex with anyone. E.C. stated that she was having sex with a “guy from school.” A few days later, Ms. Michele Brown called Ms. Penson and told her that “she should get [E.C.] checked because [she] believed [E.C. was] having sex.”

The Defendant was the last witness to testify at trial. He stated that he has cerebral palsy, which affects “the whole left side of [his] body [and his] speech.” He denied ever touching E.C. in an inappropriate manner. He said that the only reason he called Ms. A. Brown and Mr. Butts was to find out “what was going on” because Ms. Michele Brown and his father had just told him that he was accused of raping E.C. He stated that they misunderstood and mischaracterized what he said to them on the telephone.

ANALYSIS

Prior Consistent Statement: E.C.’s Diary

Age was a pivotal issue in this case because the Defendant was charged with child rape. As such, the State had to prove that the victim was “more than three (3) years of age but less than thirteen (13) years of age.” Tenn. Code Ann. § 39-13-522. At trial, E.C. testified that she knew that the Defendant raped her in June 2004, before her thirteenth birthday, because she “wrote it down in [her] diary.” The Defendant objected to the victim’s statements concerning the diary and moved for a mistrial, and the trial court held a jury-out hearing. After the jury-out hearing, the trial court denied the motion for a mistrial and issued the following limiting instruction to the jury:

There's been some reference from this witness having to do with a diary. Now, let me further instruct you. The State has also said that [the] diary doesn't exist. All right? Now, I'm going to instruct you in this manner. You [cannot] consider and speculate as to what, if anything, was in that diary, and it can only be considered for this limited purpose. That she noted when events occurred. Whether or not she noted when an event occurred is all that you [can] consider.

. . .

You [cannot] in any way speculate as to whether or not - - it's up to you to decide whether it was even made, you see. That's your decision

On appeal, the Defendant argues that E.C.'s testimony concerning the diary was a prior consistent statement used to bolster her testimony and that such testimony was inadmissible hearsay. The Defendant claims that the trial court abused its discretion when it did not grant the Defendant's motion for a mistrial after the jury heard testimony concerning the inadmissible prior consistent statement. The State contends that the reference to the diary was not a prior consistent statement because they did not introduce any statements from the diary. Rather, E.C. testified that she remembered writing in her diary, but she did not testify as to any statement that she wrote in the diary.

According to the Tennessee Rules of Evidence, a statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion." Tenn. R. Evid. 801(a). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay is not admissible unless an exception to the hearsay rule applies. Tenn. R. Evid. 802.

E.C. testified that she knew that the first rape occurred in June because she wrote about it in her diary. The actual statements written in the diary were not discussed or disclosed to the jury. E.C. merely testified that she wrote in her diary at a certain time. Testimony concerning the action of writing about an event in a diary is not a statement intended as an assertion; therefore, such testimony is not hearsay. Tenn. R. Evid. 801(c). Accordingly, the trial court's denial of the Defendant's motion for a mistrial was supported by the record because the evidence was properly admitted.

Prior Consistent Statements: Ms. Penson and Mr. Dowling

The Defendant challenges the admissibility of testimony from Ms. Penson and Mr. Dowling. Both witnesses testified that E.C. told them that she was raped. The Defendant contends that such statements were offered as prior consistent statements and were used to bolster the victim's testimony before her credibility was sufficiently attacked. The State argues that the victim's credibility was sufficiently attacked in opening statements and in the Defendant's cross-examination of the victim.

When defense counsel cross-examined E.C., she asked E.C. about her alleged conversation with Ms. Michele Brown. E.C. denied calling Ms. Michele Brown and telling her that she was sleeping with a young man she met at school. Defense counsel also asked her about her statements to a case worker of the Department of Children's Services (DCS). E.C. denied telling the DCS worker that she was thirteen at the time of the second rape. The State argued, in a jury-out hearing, that her credibility was attacked and should be rehabilitated because of the Defendant's opening statement and the line of questioning during E.C.'s cross-examination regarding her discussion with Ms. Michele Brown and the timing of the rapes. The State claimed that they should be allowed to ask Ms. Penson about the prior consistent statement because E.C. allegedly told her that she was raped by the Defendant before her thirteenth birthday. The State did not indicate whether E.C. told Mr. Dowling about the timing of the rapes.

The court rejected the argument that E.C.'s credibility was attacked during opening statements but allowed the State to ask the two witnesses whether E.C. told them that the Defendant had raped her. Out of the presence of the jury, the trial court ruled on the issue and stated:

The Court is going to, for the limited purpose, allow you to ask whether or not the statement that she made - - if I understand it, before [Mr. Dowling] and [Ms. Penson], the Court will allow you to ask if she made that statement. It can be entertained only for the limited purpose of corroborating any other statements that she has made here under oath, and I would instruct the jury. I believe that is the proper way, because it's still for the jury to decide whether any statement was made and the weight to be given anything dealing with corroboration, or contradiction.

The State then proceeded with direct examination and asked Ms. Penson questions relating to the identity of the rapist and the timing of the rapes. Ms. Penson stated that E.C. told her that the Defendant raped her "twice in the summer, in June and July." During Ms. Penson's cross-examination, Ms. Penson stated that she told a DCS case worker that E.C. was raped "somewhere between the 12th and 13th birthday."

In regards to Mr. Dowling's testimony, the testimony elicited from Mr. Dowling did not relate to the exact timing of the second rape, but his testimony did relate to the identity of the rapist. He stated that she told him that a family member's boyfriend raped her in the summer. This testimony confirmed E.C.'s statement that the Defendant, a family member's boyfriend, raped her.

This court has held that "[o]rdinarily, it is impermissible to corroborate a witness' testimony by evidence of the witness making prior consistent statements, absent an impeaching attack on that testimony." State v. Meeks, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993) (citing State v. Braggs, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980)). There are two circumstances in which prior consistent statements may be admissible: (1) when a witness is impeached through the introduction of a prior inconsistent statement that suggests that the witness's testimony was "either fabricated or based upon faulty recollection," Id., and, (2) when a witness's prior statement is used out of context to cross-examine the witness. State v. Boyd, 797 S.W.2d 589, 593-94 (Tenn. 1990).

However, "[p]rior statements of witnesses, whether consistent or inconsistent with their trial testimony, constitute hearsay evidence if offered for the truth of the matter asserted therein." Braggs, 604 S.W.2d at 885 (citations omitted). Consequently, prior consistent statement testimony, regardless of which exception is used to justify its use, is subject to two conditions. First, before a prior consistent statement may be admissible, "the witness' testimony must have been assailed or attacked to the extent that the witness' testimony needs rehabilitating." State v. Hodge, 989 S.W.2d 717, 725 (Tenn. Crim. App. 1998) (citing State v. Benton, 759 S.W.2d 427, 434 (Tenn. Crim. App. 1998)). Second, the trial court must have instructed the jury that the "statement was not to be considered for the truth of the matters contained therein." Braggs, 604 S.W.2d at 885 (citations omitted).

In regard to the first condition, whether the victim's credibility was attacked on the issue of identity, defense counsel asked E.C. whether she told Ms. Michele Brown that she was having sex with a boy from school. E.C. denied ever calling Ms. Michele Brown on the phone. She also specifically denied telling Ms. Michele Brown that she "had sexual relations with a boy at school." In regard to whether the victim's credibility was attacked on the issue of the timing of the second rape, defense counsel questioned E.C. about an inconsistent statement E.C. made to a DCS worker. Defense counsel asked, "Do you remember telling the lady from DCS one of the times that you talked to her that you thought that you had actually turned 13 the time the second incident happened." E.C. responded by saying, "No." Accordingly, we conclude that E.C.'s testimony was sufficiently attacked and needed rehabilitation in regard to the identity of the rapist and the timing of the second rape. Hodge, 989 S.W.2d at 725.

In regard to the second condition, whether the trial court issued a limiting instruction, we must note that the trial court did not issue a limiting instruction to the jury at the time that these prior consistent statements were elicited. However, when ruling on the issue, the trial judge indicated that he would instruct the jury. The jury instructions are not included in the record on appeal; therefore, we presume, without evidence to the contrary, that the trial court did issue a limiting instruction in the final jury instructions. State v. Arnold, 719 S.W.2d 543, 550 (Tenn. Crim. App. 1986). Accordingly, we conclude that the trial court did not err in allowing these statements into evidence.

Sufficiency

The Defendant argues that the evidence produced at trial was insufficient to support his convictions for child rape. The Defendant also contends that the evidence was insufficient to support the second count of child rape because the count does not allege a specific date and the victim turned thirteen on July 14, 2004. In addition, the victim told a DCS case worker that the rape happened after her thirteenth birthday. The State argues that the evidence is sufficient to support the convictions.

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). "A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and [on appeal] the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict." Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). "This [standard] applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of [both] direct and circumstantial evidence." State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

Rape of a child is defined as "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522 (2003). The Tennessee Code Annotated defines sexual penetration as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other

intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." Tenn. Code Ann. § 39-13-501(7). We will discuss each count in turn.

As to the first count of child rape, the evidence before the jury was substantial. The victim testified that she was raped in June 2004 and that she remembered it was June because she wrote about the rape in her diary. Several witnesses testified concerning the victim's change in behavior after the time of the rapes. Dr. Machen testified that the notches in E.C.'s hymen were consistent with penetration. After the Defendant learned about the accusations, he called family members and stated that he was the one who raped E.C. and that he raped her twice. We conclude that the evidence produced at trial was sufficient for the jury to find the Defendant guilty of the first count of child rape.

In regard to the second count of rape, the only difference in the proof relates to the timing of the rape because E.C. turned thirteen on July 14, 2004. E.C. testified that she was raped before her thirteenth birthday. While the testimony at trial was conflicting, the jury chose to accredit the State's witnesses and find that the rape was committed before the victim's thirteenth birthday. We conclude that the evidence was sufficient to support the second count of child rape beyond a reasonable doubt.

Jury Charge

The Defendant argues that the trial court should have included statutory rape in the jury instructions as a lesser included offense of child rape. The record indicates that the Defendant requested the instruction in the trial court's chambers out of the presence of the jury and the court reporter. When the parties returned to court, the trial court declined the Defendant's request on the record and stated, "[T]he reason I declined is because I believe it brings an element into this case that was not charged in the indictment. So, therefore, I don't believe it's available as a lesser-included offense."

We first note that the Defendant failed to make a written request for this jury instruction. "Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for new trial or on appeal." Tenn. Code Ann. § 40-18-110(c). Similarly, our supreme court has held that "if a defendant fails to request an instruction on a lesser-included offense in writing at trial, the issue will be waived for purposes of plenary appellate review and cannot be cited as error in a motion for new trial or on appeal." State v. Page, 184 S.W.3d 223, 229 (Tenn. 2006) (emphasis added). Therefore, we conclude that the issue regarding the statutory rape jury instruction is waived because the Defendant failed to file a written request.

However, our supreme court also made clear that when a jury instruction is waived for failure to request it in writing, an appellate court may still review the issue for plain error. Id. at 230. “When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.” Tenn. R. App. P. 36(b). In determining whether plain error review is appropriate, the following factors must be established:

- (a) The record . . . clearly establish[es] what occurred in the trial court;
- (b) a clear and unequivocal rule of law [has] been breached;
- (c) a substantial right of the accused [has] been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is “necessary to do substantial justice.”

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). On appeal, the defendant has the burden of establishing that these five factors are met. State v. Gomez, 239 S.W.3d 733, 737 (Tenn. 2007) (“Gomez II”) (citing State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007)). The appellate court need not consider all five factors if any single factor indicates that relief is not warranted. Smith, 24 S.W.3d at 283.

In this case, the first plain error factor is met because even though the Defendant failed to include the jury instructions in the record on appeal, the trial court stated that he was not going to include statutory rape in the jury instructions as a lesser-included offense of child rape. We begin our determination of whether a clear and unequivocal rule of law has been breached by reviewing the standard established in State v. Burns, 6 S.W.3d 453 (Tenn. 1999), for determining what constitutes a lesser-included offense:

An offense is a lesser-included offense if:

- (a) all of its statutory elements are included within the statutory elements of the offense charged; or

(b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing

(1) a different mental state indicating a lesser kind of culpability; and/or

(2) a less serious harm or risk of harm to the same person, property or public interest; or

(c) it consists of

(1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Burns, 6 S.W.3d at 466-67.

In this case, the indictment charged the Defendant with child rape. Rape of a child is defined as “the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age.” Tenn. Code Ann. § 39-13-522 (2003). “Statutory rape is sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim.” Tenn. Code Ann. § 39-13-506(a). “Statutory rape includes an element that is not included in the elements of rape of a child: there must be at least a four (4) year age difference between the victim and the accused. Moreover, the age of a statutory rape victim must be at least thirteen (13) while the age of a child rape victim must be no more than twelve (12).” State v. Ealey, 959 S.W.2d 605, 610-11 (Tenn. Crim. App. 1997). “[T]hese two crimes are mutually exclusive: depending on the age of the victim an accused may be guilty of one or the other of these offenses at a given point in time, but not both.” Id. at 611. (citing State v. Woodcock, 922 S.W.2d 904, 913 (Tenn. Crim. App. 1995)). The defendant was not entitled to a jury instruction on statutory rape because statutory rape is not a lesser-included offense of child

rape. Accordingly, we conclude that the trial court's refusal to give the instruction did not violate a clear and unequivocal rule of law; therefore, the Defendant cannot establish plain error on this issue.

Sentencing

The Defendant's final issue is that the trial court improperly sentenced him. The Defendant contends that the trial court improperly considered enhancement factors that were not found by the jury and were not supported by the evidence produced at trial. The Defendant claims that his sentence of 20 years was improper because he elected to be sentenced pursuant to the new "presumptive minimum" sentence of fifteen years for a Class A felony. The State contends that the record supports the trial court's sentencing decision.

The Defendant committed these offenses in June and July 2004, and he subsequently elected to be sentenced under the revised sentencing act as enacted by the Tennessee General Assembly in 2005. While the Defendant did state on the record his preference for sentencing under the new act, the record does not contain a written waiver. Our court has consistently held that if a Defendant wishes to waive into the new sentencing act, "such waiver must be written." State v. Matthew Joseph Carter, No. E2006-01256-CCA-R3-CD, 2008 WL 960152, *14 (Tenn. Crim. App. Apr. 9, 2008), perm. app. denied (Tenn. Oct. 27, 2008) (citations omitted). Consequently, we remand this case for a new sentencing hearing where the Defendant may be sentenced under the sentencing provisions in effect at the time of his crimes or he may execute a written waiver if he chooses to be sentenced under the revised sentencing act. Id. "At the re-sentencing hearing, neither the State nor the [Defendant] is confined to the proof at the prior hearing and may introduce additional proof as relevant to the hearing and as authorized by the sentencing act." Id.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgments of conviction are affirmed in part and reversed in part. The sentences imposed are vacated with remand to the trial court for a new sentencing hearing.

D. KELLY THOMAS, JR., JUDGE